UNITED STATES
v.
T. J. JONES, ROBERT E. JONES

IBLA 82-60 Decided April 12, 1983

Appeal from a decision of Administrative Law Judge Michael L. Morehouse declaring the Midway, Ajo, and last find No. 1 lode mining claims invalid. AZ 14866 and AZ 14869.

Affirmed.

1. Evidence: Burden of Proof--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

> When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

> A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land

   Where the land on which a mining claim is located is subsequently withdrawn from entry under the mining laws, the validity of the claim must be determined as of the date of the withdrawal through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not become valid thereafter even by the satisfaction of the discovery requirement at a later date.

4. Mining Claims: Contests--Mining Claims: Withdrawn Land

   A request by a mining claimant to drill on mining claims after the land has been withdrawn from mining is properly denied where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

5. Mining Claims: Discovery: Generally

   Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

6. Mining Claims: Discovery: Generally

   Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

7. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Hearings

   Evidence presented by the claimant which shows that a discovery had not been made may support a determination of invalidity because when a claimant introduces evidence the determination must be made on

the basis of the whole record, not just a part of it.

APPEARANCES: T. J. Jones and Robert E. Jones, pro sese; Fritz L. Goreham, Esq., Office of the Field Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

T. J. Jones and Robert E. Jones have appealed the September 15, 1981, decision of Administrative Law Judge Michael L. Morehouse which declared the Midway, 1/ Ajo, and Last Find No. 1 2/ lode mining claims invalid because "they were not timely perfected and are not presently supported by the discovery of a valuable mineral deposit" (Decision at 5). 3/

The Arizona State Office, Bureau of Land Management (BLM), initiated contests on September 3, 1980, with respect to the Midway mining claim (AZ 14866) and on September 9, 1980, with regard to the Ajo and Last Find No. 1 mining claims (AZ 14869) at the request of the U.S. Army Corps of Engineers. The BLM complaints alleged, in part, that "[v]aluable minerals have not been found within the limits of said mining claims to constitute a valid discovery within the meaning of the mining law either presently or as of August 24, 1962."

The cases were consolidated for a hearing held on April 13, 1981, in Phoenix, Arizona. Following the hearing, Administrative Law Judge Morehouse issued his decision of September 15, 1981, declaring the three mining claims null and void.

In their statement of reasons for appeal, claimants contend that: (1) there were valuable minerals to sustain the claims; (2) the Government prevented their access to the claims; (3) the Government harassed them; (4) the Government should not have expected the samples taken for assay to show valuable minerals after people, directed by Government maps, have been carrying off rocks from the claims for 40 years; and (5) any qualified non-Government mining man who can get money to mine would be interested in these claims.

We must initially address the confusion in the record concerning the August 24, 1962, date. The Judge stated that "[t]he claims were located between 1934 and 1940 and occupy an area encompassed by the Williams Military Reservation (Exh. G-3), which was withdrawn from mineral entry on August 24,

1/ This lode mining claim is situated in sec. 34, T. 9 S., R. 7 W., Gila and Salt River meridian, Maricopa County, Arizona.

2/ These lode mining claims are situated in unsurveyed sec. 32, T. 15 S., R. 9 W., Gila and Salt River meridian, Pima County, Arizona.

3/ We are unable to understand the Judge's use of the terminology "not timely perfected" in the context of this case. Although the complaints in this case alleged a failure to timely file the claims for recordation under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1744 (1976), the Judge specifically found that there had been timely compliance with the recordation requirement of FLPMA (Decision at 4).

1962 (Exh. G-1)." Exhibit G-3, which is a map, shows only the location of the Midway claim in sec. 34, T. 9 S., R. 7 W., Gila and Salt River meridian, which is clearly within the reservation. Exhibit G-1 is a copy of the Act of August 24, 1962, P.L. 87-597, 76 Stat. 399 (1962), which provides "for the withdrawal and reservation for the Department of the Air Force and the Navy of certain public lands of the United States at Luke-Williams Air Force Range, Yuma, Arizona, for defense purposes." Exhibit G-1 only describes lands in Pima County, Arizona, where the Ajo and Last Find No. 1 claims are located. The land embracing the Midway claim is not described. Such land was withdrawn from location under the mining laws, however, by Exec. Order No. 8892, 6 FR 4625 (Sept. 9, 1941) (Exh. R-1). 4/

Thus, given the state of the record before us we find that the three claims are situated in the Luke-Williams Gunnery Range in southwestern Arizona (Tr. 5). All the claims were located prior to 1941 when the area was open to mineral location. The land on which the Midway claim is located was withdrawn from mining location in 1941. The land embraced by the Ajo and Last Find No. 1 was withdrawn from mining location on August 24, 1962, by P.L. 87-597. 5/

[1, 2] When the Government contests the validity of a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Hallenback v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A valuable mineral deposit exists on a lode mining claim where there is physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and quantity as to justify a person of ordinary prudence in the expenditure of time and money for the development of a mine and the extraction of the mineral. Thomas v. Morton, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), aff'd, 552 F.2d 871 (9th Cir. 1977); Castle v. Womble, 19 L.D. 455, 457 (1894); approved, Chrisman v. Miller, 197 U.S. 313 (1905). A prima facie case has been made, therefore, when a

4/ Exec. Order No. 9526, 10 FR 369 (Feb. 28, 1945) automatically terminated this withdrawal at the expiration of the 6-month period following the termination of the unlimited national emergency (World War II) declared by Proclamation No. 2487, May 27, 1941 (55 Stat. 1647). However, Exec. Order No. 9526 expressly provided that the lands remained withdrawn from appropriation, including the mining laws, until otherwise ordered. There is no record evidence that this land was ever opened to entry. Absent such an order, it remains withdrawn from appropriation and disposal. See William C. Reiman, 54 IBLA 103 (1981).

5/ This Act withdrew and reserved the lands it encompassed for a period of 10 years with an option for a 5-year renewal. The option was exercised and this withdrawal and reservation terminated in 1977. Because claimants allege they have been denied access to all their claims since the 1940's, it is possible that the land embracing the Ajo and Last Find No. 1 claims was also withdrawn during the early 1940's for military purposes. However, that fact is not reflected in the record.

Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. Foster v. Seaton, supra; United States v. Knecht, 39 IBLA 8 (1979).

[3] Since the claims in question are located on land which subsequently was withdrawn from entry under the mining laws, the validity of the claims must be determined as of the time of the withdrawal as well as through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claims could not become valid thereafter by any additional exploratory work or through an increase of mineral value due to a change in the market. United States v. Chappell, 42 IBLA 74 (1979); Andrew J. Van Derpoel, 33 IBLA 248 (1978); United States v. Rogers, 32 IBLA 77 (1977).

We will first examine the evidence presented concerning the Midway lode claim. At the hearing, the BLM mineral examiner, William Nelson, testified that he examined the Midway claim accompanied by T. J. Jones and his wife and took four samples from the exposed workings on the claim. The highest value reflected in the assay report on those samples was 0.30 percent copper. He valued that amount of copper at the time of the hearing at $5.46 a ton (Tr. 51). Nelson then testified that the present cutoff point on copper is about 0.50 percent or about 10 pounds per ton (Tr. 52). He concluded that the prudent man "wouldn't spend his time and means with a reasonable expectation of developing a mine" on Midway because "[t]he grade is too low, and that it's not of a present value for mining" (Tr. 54).

Nelson further testified that in 1962 most of the open pit copper mines were operating at about 0.50 percent grade ore and that the price of copper and the operating costs would have been lower in 1962 as compared to the time of the hearing (Tr. 54-55). The examiner testified as to the year 1962 because the Government mistakenly believed that the 1962 withdrawal statute encompassed the land on which the Midway claim is located. As we stated earlier, however, the Midway claim is located on land withdrawn in 1941 by Executive order. The Government did not, therefore, establish a prima facie case to show a lack of discovery prior to the 1941 withdrawal. However, the Government did make a prima facie showing that no discovery of a valuable mineral deposit existed on the Midway claim at the time of the hearing.

[4] In this case, claimants allege they have been foreclosed from working their claims since World War II because the land has been devoted to military purposes, and, apparently, all the claims have been leased by the Corps of Engineers since the late 1940's (Tr. 13). Although the Government made a prima facie showing of lack of discovery, claimants' response is that they have been unable to work any of the claims since the 1940's. In such a situation if a mining claimant could show that sufficient mineralization existed on a claim such that further testing would be necessary only to confirm and corroborate the extent of a preexisting exposure of a valuable mineral deposit discovered prior to a withdrawal, the claim should not be declared null and void absent the allowance of further testing by the claimant. Cf. United States v. Chappell, supra at 81 (refusal by the National Park Service to allow redrilling upheld because necessary showing not made). However, in this case claimants have presented no evidence of a preexisting discovery.

The claimants responded to the mineral examiner's testimony by asserting that there was valuable ore, cuprite, on the Midway claim. All that was presented to support their assertions were two letters written in 1964 from third parties which were read into the record. The first one referred to planned operations on the Midway claim and the second referred to assay reports showing 3-1/2 percent copper which claimant T. J. Jones asserted referred to the Midway claim.

The Government protested that no proper foundation was laid for the introduction of the letters as evidence, and that there could be no cross-examination of the authors. The letter discussing the conclusions of assay reports did not present evidence supporting how and where the samples referred to were taken, or even that they were taken on the Midway claim. See United States v. Porter, 37 IBLA 313 (1978); United States v. Nicholson, 31 IBLA 224 (1977). The letters, therefore, have very limited probative value as to the existence of a discovery of valuable minerals on the Midway claim.

[5] The claimants further asserted that the Government would not allow them on the land to do further drilling under the planned operations discussed in the 1964 letter. In their appeal, claimants characterized the Government refusal as harassment. However, claimants presented no evidence to establish a discovery on the Midway claim. Claimants acknowledged that what was necessary was further exploration. T. J. Jones specifically stated: "[T]here's nothing there to show that there was any ore except what you might dream for down below" (Tr. 68). As we said in United States v. Woolsey, 13 IBLA 120, 123-24 (1973):

> [P]roof that further exploration may be justified is not proof of a discovery of a valuable mineral deposit. What is necessary is proof that a prudent man would be justified in beginning actual development of the property with a reasonable prospect of success in developing a paying mine. Converse v. Udall, [399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969)]; United States v. Kelty, [11 IBLA 38 (1973)]; United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971). [Emphasis in original.]

The Government mineral examiner testified in response to the claimants' questioning that what claimants had been proposing to do when the Government denied them access was further prospecting in hopes of making a discovery to be able to prove whether something of value was there. As in Chappell, the Government's refusal to allow additional exploratory work after the land had been withdrawn was proper.

Claimants failed to rebut the Government's showing and, in fact, claimants' evidence supports the finding that there is no discovery of a valuable mineral deposit on the Midway claim. 6/

6/ When a mining claimant "goes forward and presents evidence, that evidence is properly considered as part of the entire evidentiary record and if damaging to the contestee's case may be used against him." United States v. Chappell, supra at 78.

The Judge also found the Ajo and Last Find No. 1 lode mining claims null and void. He summarized the evidence presented by the Government as follows:

Mr. Robert A. McColly, a geologist employed by the Bureau of Land Management, testified that he examined the Ajo and Last Find No. 1 claims in May 1978 accompanied by Messrs. T. J. and Robert Jones. He took three samples from the Ajo claim and one from the Last Find No. 1. These samples were assayed (G-18) and one of the samples (A-2 and Ex. G-18) showed .44 ounces of gold per ton. Mr. McColly stated that this was a good value but that * * * the claim needed further work. He stated that while he felt there was potential on the Ajo claim for some high value material, it was his opinion * * * that a reasonably prudent man would not be justified in expending his time and means with a reasonable prospect of success in developing a paying mine. He had the same opinion regarding the Last Find No. 1 claim because of the low assay value of the sample taken (LF-1 on Ex. G-18).

(Decision at 3).

[6] As this Board stated in United States v. Wells, 69 IBLA 363 (1983), "Isolated showings of high gold and silver values are not sufficient by themselves to establish the discovery of a valuable mineral deposit." A mining claimant must show that higher value gold samples were part of a continuous mineralization that could establish the existence of a sufficient quantity of ore. See United States v. Whitney, 51 IBLA 73 (1980).

[7] Claimants assert that the selling of minerals from the claims was enough proof to establish a discovery. However, their own testimony did not support such an assertion. T. J. Jones testified that although his father-in-law, who worked the Ajo claim from about 1915 to 1922, made a living out of the Ajo, he never got any money from the claims (Tr. 111). Later, he indicated that some individual got $900 for one load of ore from the Ajo claim, but he concluded that "outside of one load, that old mine quit" (Tr. 117). Ultimately, he stated that he though his father-in-law lost more than he claimed. T. J. Jones testified that he had never taken any ore out of the mine after he took it over in 1934. He did have a lease agreement with two men who worked on the Ajo for 2 years or so, but he "never got a dime out of it. All I got was work" (Tr. 117). He still believes there are good values on the claim.

Thus, claimants' own testimony reveals a dearth of sales from the Ajo claim. In addition, claimants failed to establish the existence of a sufficient quantity of ore-bearing mineral within the Ajo claim. Their testimony corroborates the examiner's conclusion on the Ajo claim. Claimants presented no evidence to rebut the Government's evidence concerning the Last Find No. 1 claim.

The Government established a prima facie case of lack of discovery of a valuable mineral deposit on these two claims. Claimants failed to rebut. Even if the Government had failed to present a prima facie case, claimants own evidence established a lack of discovery of a valuable mineral deposit both prior to the withdrawal and at the time of the hearing. See United

States v. Beckley, 66 IBLA 357, 363 (1982). The record is clear that no discovery existed at the time of the 1962 withdrawal of record in this case and, in addition, no discovery existed at the time in the 1940's that claimants assert work on the claims was prohibited.

The Judge observed in the decision below at page 5:

> Prior to the withdrawal date in 1962, they could have * * * applied for patent and in the process attempted to prove the validity of the claims. That they did not do so and that subsequent events have made it difficult for them to comply with the requirements of the mining law is unfortunate. However, this can hardly serve as a basis to secure the validity of the claims.

We agree.

Claimants' final assertion was that any qualified non-Government mining man would be interested in these claims. Claimants received adequate notice of the pendency of the hearing and could have, at that time, made diligent efforts to assemble such information, including testimony from a qualified non-Government mining man if claimants desired, as would refute the charges alleged by the Government. This they did not do.

No reasons have been presented to persuade the Board to disturb the conclusion of the Judge that the three lode mining claims are null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.